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Counsel for Defendant Lindsey Kinney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	
)	No. 1:22-cr-00031-DKW
Plaintiff,)	
)	DEFENDANT'S SECOND
v.)	MOTION IN LIMINE (TO
)	EXCLUDE EVIDENCE
LINDSEY KINNEY,)	CONCERNING FIREARMS)
)	
Defendant.)	

I. Introduction and Background Facts

Mr. Kinney is charged by Superseding Indictment with twice posting on Instagram a threat to kill “by beheading.” Docket Sub. No. 47 (Superseding Indictment). Neither of the allegedly offending Instagram posts references firearms or shooting in any way.

Discovery produced by the government to date includes evidence that Mr. Kinney has possessed firearms and associated items such as ammunition and body armor. This discovery consists in various images and videos recovered from Mr.

Kinney's phone (which are the subject of a pending motion to suppress, Docket Sub. No. 53) and various law enforcement reports. The government has provided notice they intend to introduce such evidence at Docket Sub. No. 60 (Notice of Intent to Introduce Evidence Pursuant to Rule 404(b)) at p. 2 ¶1. (KINNEY_000183, 892), ¶3.a. (Item 1 (chats)), ¶3.b. (Items 11-13, 15-17, 28-39, 46-53 (images)). A representative (but not exhaustive) sampling of this discovery is attached hereto as Appendix A.

In addition, Mr. Kinney's home was searched pursuant to a warrant on November 9, 2020, (more than a year prior to the first alleged threat in this case). Mr. Kinney has not been charged with any crimes in connection with this search or its fruits and the government has produced limited discovery herein regarding the same. Discovery that has been produced indicates ammunition, firearm accessories, and firearms were seized. (The admission of evidence more broadly concerning the execution of this search will be addressed in a separate motion in limine.)

II. Argument

The constitution protects an individual's right to keep and bear arms.¹ These protections encompass the right to possess a firearm (whether connected to service in a militia or not) and to use a firearm for traditionally lawful purposes.² Such rights

¹U.S. Const. amend. II.

²*District of Columbia v. Heller*, 554 U.S. 570, 635-36, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

are protected both in the home³ and in public.⁴

It is well established that neither the government nor the court may penalize a defendant for the exercise of a constitutional right.⁵ The Second Amendment right to bear arms is not some sort of “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.”⁶ Just as the government may not invite a jury to infer guilt based on the exercise of a Fifth or Sixth Amendment right, the government should not be permitted to use a defendant's exercise of his Second Amendment rights in this way.

The Third Circuit examined a similar situation in *United States v. Himelwright*.⁷ Like Mr. Kinney, Himelwright was charged with making interstate threats in violation of 18 U.S.C. § 875.⁸ The day after Himelwright's threats, a pistol

³*Id.*

⁴*New York State Rifle & Pistol Ass'n v. Bruen*, --- U.S. ---, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

⁵*See, e.g., Alo v. Olim*, 639 F.2d 466, 468 (9th Cir. 1980) (use of silence in response to interrogation was impermissible burden on Fifth Amendment rights); *United States v. Gonzalez*, 897 F.2d 1018, 1020 (9th Cir. 1990) (“accused may not be subjected to more severe punishment for exercising his constitutional right to stand trial”); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (comment on defendant's retention of counsel violated Sixth Amendment); *Blackledge v. Perry*, 417 U.S. 21, 28-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (state may not respond to invocation of right to appeal by bringing a more serious charge prior to retrial).

⁶*Bruen*, 142 S. Ct. at 2156; *citing, McDonald v. City of Chicago*, 561 U.S. 742, 780, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

⁷42 F.3d 777 (3rd Cir. 1994).

⁸*Id.* at 779.

and a revolver were seized from his home.⁹ At his subsequent trial, the government introduced evidence of the seized firearms.¹⁰ The court of appeals reversed Himelwright's convictions finding the trial court abused its discretion in admitting such evidence.¹¹ The court reasoned that absent evidence connecting the threats and the firearms, evidence of the latter was inadmissible under Evidence Rules 402, 403, and 404.¹² The court concluded such evidence was impermissible character evidence and even if such evidence had some marginally relevant permissible purpose, its probative value was substantially outweighed by the resulting prejudice.¹³

The words Himelwright uttered . . . all speak for themselves. Without question, a rational chain of inferences could be drawn from these evidentiary links, each of which bore some logical relevance to the criminal charges Himelwright faced. But to compound that evidence by asking the jury to draw inferences as to Himelwright's intent from his purchase and possession of the two firearms was, we think, to invite a degree of prejudice which outweighed the probative value of that evidence under a proper balancing pursuant to Rule 403.

The Ninth Circuit decision in *United States v. Sutcliffe*¹⁴ does not demand a different result. The charged conduct in *Sutcliffe* included threats, “I will kill you” and “I’m now armed” and the trial court allowed evidence of Sutcliffe's possession

⁹ *Id.* at 781.

¹⁰ *Id.*

¹¹ *Id.* at 787.

¹² *Id.* at 781-87.

¹³ *Id.* at 785.

¹⁴ 505 F.3d 944 (9th Cir. 2007).

of a rifle, bayonette, and ammunition during the time in which he transmitted his threats to prove specific intent to threaten.¹⁵ The Court subsequently reasoned that the highly specific character of the messages in *Sutcliffe* was “most important” to the Court's reasoning on this issue and in that highly specific context, admission of the firearms evidence was not an abuse of discretion.¹⁶

Here, the Government has charged two highly specific threats – both to kill “by beheading” posted on January 17 and March 28, 2022. Mr. Kinney’s possession of firearms is unrelated to these posts. Mr. Kinney's possession of firearms is protected by the Second Amendment, does not tend to prove that he intended to threaten to behead anyone, cannot be used as character evidence, and in any event its probative value if any is outweighed by the danger of unfair prejudice.

III. Conclusion

Mr. Kinney's alleged threats speak for themselves. There is no connection between these alleged threats of beheading and Mr. Kinney's exercise of his Second Amendment rights before or after the same. Evidence of Mr. Kinney's possession of firearms and related items should not be admitted at trial.

DATED this 22nd day of November, 2022.

/s/ Cassandra Stamm
Law Offices of Cassandra Stamm, LLC

¹⁵ *Id.* at 958-59.

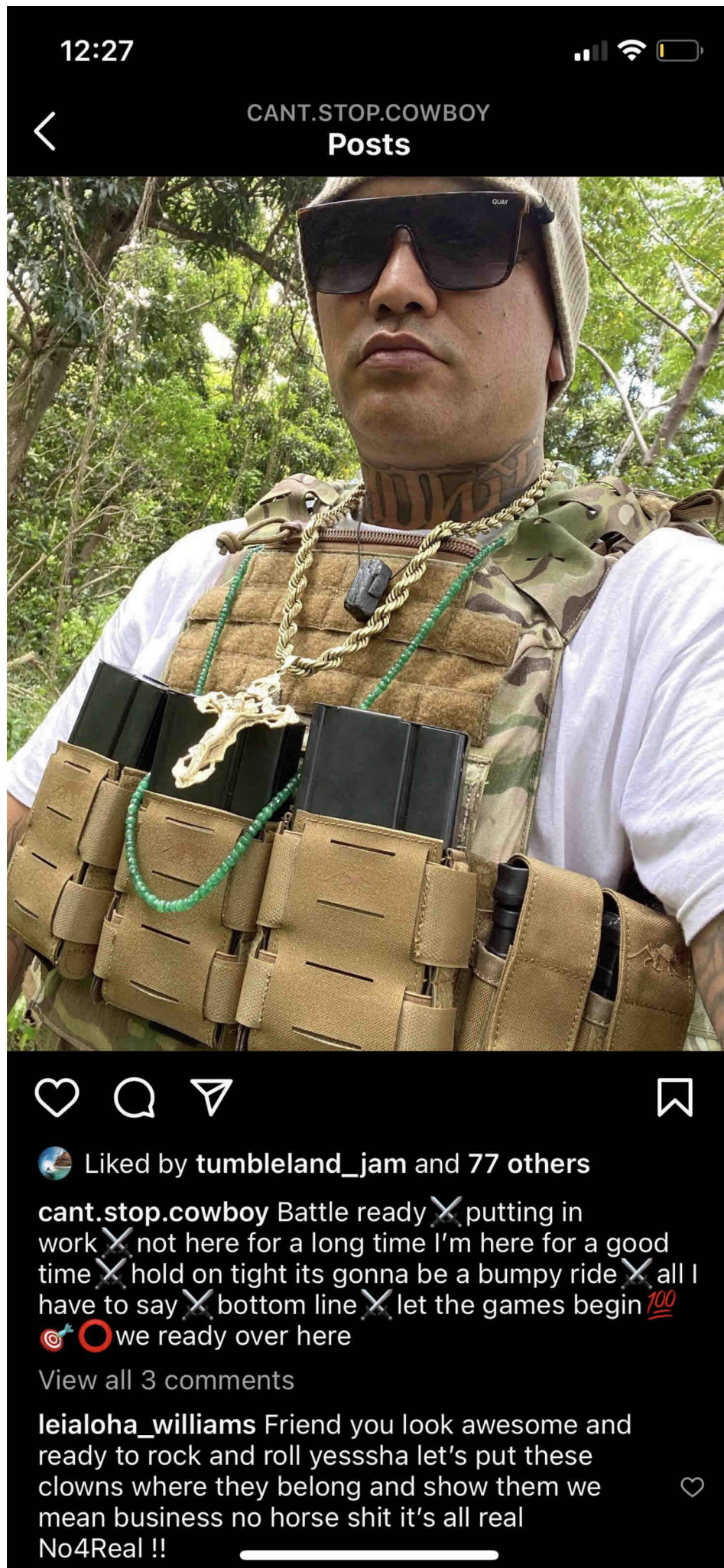
¹⁶ *United States v. Bagdasarian*, 652 F.3d 1113, 1123 (9th Cir. 2011).

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2022, I electronically filed the foregoing Second Motion in Limine with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Government.

/s/ Cassandra Stamm
Law Offices of Cassandra Stamm, LLC

Appendix A





From: +18082773006 +1 (808) 277-3006 (owner)
 To: +18085942197
 To: +18082773006 +1 (808) 277-3006 (owner)

If people want to talk to me..come talk to my face

Participant	Delivered	Read	Played
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+18085942197			
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+18082773006 +1 (808) 277-3006			
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Status: Sent

3/20/2022 10:00:46 AM(UTC-10)

Source Extraction:
Legacy

From: +18082773006 +1 (808) 277-3006 (owner)
 To: +18085942197
 To: +18082773006 +1 (808) 277-3006 (owner)

After hemp and I free Hawaii..there will be a huge Execution of all the leaders that are selling out the people..for slavery and Treason..i don't need to explain my self..this is what needs to be done..my land is being Attacked..I just saved it by using them..people have no eyes to see..simple..I'm still running for governor me and hemp would like u on our team..it's your choice

Participant	Delivered	Read	Played
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+18085942197			
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+18082773006 +1 (808) 277-3006			
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Status: Sent

3/20/2022 10:06:05 AM(UTC-10)

Source Extraction:
Legacy

From: +18082773006 +1 (808) 277-3006 (owner)
 To: +18085942197
 To: +18082773006 +1 (808) 277-3006 (owner)

I lose my land what u guys going do..hector can't get my guns back or get the money for running for governor..no one is here to hold the line to protect my land..this pyramid..I'll do this my self..everyone can watch and learn

Participant	Delivered	Read	Played
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+18085942197			
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+18082773006 +1 (808) 277-3006			
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Status: Sent

3/20/2022 10:12:15 AM(UTC-10)

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Legacy







